DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

POSTAL RATE AND FEE CHANGES, 1997	Docket No. R97-1

UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO NEWSPAPER ASSOCIATION OF AMERICA MOTION TO COMPEL ADMISSION FROM THE UNITED STATES POSTAL SERVICE (NAA/USPS-RFA-1)

On February 17, 1998, NAA filed a request for admissions (RFA) directed to the Postal Service. RFA-1 asks that the Postal Service confirm the existence of a document entitled "United States Postal Service 1998 Marketing Plans." RFA-2 through RFA-6 ask that the Postal Service admit to various statements allegedly quoted from the document. On February 27, 1998, the Postal Service filed a timely objection to the RFA on grounds that it was filed out of time and not within Special Rule 2E. On March 11, 1998, NAA filed its Motion to Compel Admission from the United States Postal Service ("Motion"). On that same date, NAA filed a copy of a document entitled "United States Postal Service 1998 Marketing Plans" as Library Reference NAA/R97-1 LR-2. One day later, the Presiding Officer issued P.O. Ruling No. R97-1/109, which shortened the time for the Postal Service to respond to NAA's Motion by setting a due date of March 16, 1998 for this pleading.

In its Motion, NAA seeks to compel a response only to its first request for admission, NAA/USPS-RFA-1.[1] NAA's Motion must be denied. NAA has failed to demonstrate that its RFA is proper discovery under Rule 2E. Efforts to introduce NAA/R97-1 LR-2 or any portion of its contents at this stage of the proceeding would,

[1] NAA/USPS-RFA-1 asks, "[p]lease admit the existence of a document entitled 'United States Postal Service 1998 Marketing Plans' of which the attached is a copy of the cover page. If you cannot completely confirm, please explain."

moreover, be substantially outweighed by the danger of unfair prejudice to the Postal Service.

As explained in the Postal Service's objection, the RFA is filed out of time under Special Rule of Practice 2E ("Special Rule 2E"). That rule creates an exception to the general rule that discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case, by allowing participants to obtain, up to 20 days prior to the due date for filing rebuttal testimony, "information (such as operating procedures or data) available only from the Postal Service."[2]

Well-established Commission precedents limit the scope of discovery under Rule 2E. As clearly explained in P.O. Ruling No. MC97-1/85, the purpose for which participants may avail themselves of discovery under Special Rule 2E is quite narrow. Special Rule 2E "enable[s] a participant to obtain information available only from the Postal Service for the purpose of developing rebuttal testimony." P.O. Ruling No. R97-1/85; *see also* P.O. Ruling No. R97-1/89.[3] The Presiding Officer's holdings in the instant docket are consistent with prior rulings that Special Rule 2E is intended for the specific purpose of *developing rebuttal testimony*, not for other, more far-reaching

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[2] The time for submitting discovery to the Postal Service under Rule 2E expired on February 17. P.O. Ruling No. R97-1/54.

[3] *See also* P.O. Ruling No. MC96-3/36 at 3 (Special Rule 2E "is limited to when a participant needs data available only from the Postal Service *in order to prepare testimony to rebut participants other than the Postal Service*." (emphasis added)); Presiding Officer's Ruling No. MC96-3/21 similarly provides that:

> Rule 2.E was generally intended to extend the otherwise applicable discovery period for information that can be obtained only from the Postal Service that is *needed to prepare rebuttal testimony*.

P.O. Ruling No. MC96-3/21 at 2 (emphasis added).

purposes. This is clearly set forth in P.O. Ruling No. R87-1/138,[4] where the Presiding Officer explained:

> To qualify for th[e] exception [under Special Rule 2E], the interrogatory must seek information that is obtainable only from the Postal Service, address areas not explained in the Postal Service's direct case, and *be needed to prepare the discovering party's evidence.*

P.O. Ruling No. R87-1/138 at 2 (emphasis added). In P.O. Ruling No. R87-1/108, the Presiding Officer explained the underlying reason for such limitations:

> Special Rule 2.E was not intended to extend unlimited discovery against the Postal Service for an unreasonable period of time. Rather, its purpose is to *enable parties to prepare evidentiary presentations for submission to the Commission.* . . . While parties may have to begin to develop evidentiary presentations prior to the appearance of Postal Service witnesses, it would be unusual for a party to have completed preparation of its evidence before the Postal Service direct case has become evidence. As a result, parties generally are preparing evidence after the Postal Service has completed presentation of its direct case. *While preparing that evidence*, participants are likely to encounter areas where additional information from the Postal Service is necessary. Such information may include data maintained by the Service, or involve the methods used by the Postal Service to prepare regularly reported data or perform certain operations; in other words, relevant facts which have not yet become part of the record.

P.O. Ruling R87-1/108 at 1-2 (emphasis added). The burden of establishing that the purpose of the discovery request is for the development of *testimony* rests with the party conducting discovery. In Ruling No. R87-1/118, the Presiding Officer warned parties of this responsibility:

> parties seeking to rely on 2.E should be aware that upon Postal Service objection, it is their burden to demonstrate how the requested information is to be used in the party's testimony. . . . Otherwise, it would be possible for Special Rule 2.E to evolve into another round of discovery against the Service.

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[4] Special Rule 2E in Docket No. R87-1 was the same in material respects to Special Rule 2E in the instant docket. *See* Docket No. R87-1/3, Attachment B at 3-4.

P.O. Ruling No. R87-1/118 at 2.

In this case, NAA has manifestly failed to meet its burden. Even assuming that the RFA was designed to elicit "information or data" available only from the Postal Service, in order for the RFA to fall within the scope of Special Rule 2E at this stage of the proceeding, consistent with P.O. Ruling No. R87-1/118, NAA has the burden of showing that the RFA is intended to elicit information to develop rebuttal testimony. Nowhere in its Motion does NAA represent that this is its purpose. Simply put, the RFA is improper discovery under Special Rule 2E because NAA cannot link it with the preparation or filing of rebuttal testimony.

NAA contends that because it has framed its discovery in the form of a request for admission under Rule 27 of the Rules of Practice and Procedure, it is entitled to propound RFA-1 notwithstanding the procedural deadlines set forth for discovery on the Postal Service. NAA Motion at 3-4. NAA's argument rests on a fundamentally *erroneous reading of the pertinent rules of practice.* All discovery, *including requests* for admission under Rule 27, are expressly made subordinate to the Special Rules of Practice. Special Rule 2A makes clear that "[s]ections 25, 26, and 27 of the rules of practice apply during the discovery stage of this proceeding *except when specifically overtaken by these special rules.*" P.O. Ruling No. R97-1/4 (emphasis added). There is nothing exceptional in the fact that NAA's discovery request is a request for admission. Like any other discovery request, it is plainly out of time, and does not fall within the scope of permissible discovery under Special Rule 2E. It is accordingly of no consequence that NAA has framed its discovery request under Rule 27.

NAA also fails in its attempt to link this controversy to the absence of a record indicating whether a response or objection was filed to interrogatory NAA/USPS-10. NAA is unable to locate an answer or objection to interrogatory NAA/USPS-10, which asked the Postal Service a series of questions about market share. NAA propounded interrogatory NAA/USPS-10 more than 6 months ago, on August 29, 1997. The Postal Service and its witnesses answered thousands of questions from the participants, and it is quite possible that, in the crush of discovery, this interrogatory was overlooked or misplaced. In its Motion, NAA freely admits that it "did not recognize until recently the Postal Service's lack of response to NAA/USPS-10." NAA Motion at 6 n.3. Notwithstanding, six months after the response was due, it now contends that the "USPS is at fault for failing to respond to an interrogatory." To the contrary, Special Rule of Practice 2B places the burden on NAA to have compelled a response to this interrogatory, and to have done so within two weeks of the response of the Postal Service to that set of interrogatories, which was filed on September 12, 1997.

NAA also errs in suggesting that the circumstances surrounding NAA/USPS-10 serve as a justification for the instant motion. NAA Motion at 6-7. First, NAA's arguments rest on the speculative and unproven assumption that interrogatory NAA/USPS-10 was not objectionable and that the Presiding Officer would have compelled a response to that interrogatory had an objection to that interrogatory been lodged. Since the matter has not been litigated, the outcome on which NAA's argument is premised is far from certain. Secondly, the date the response to

NAA/USPS-10 was due *predates* the marketing plan. NAA/R97-1 LR-2 bears a date of October 1997 on its cover, which is well after September 12, 1997, when the response to NAA/USPS-10 was due. Thus, the response to NAA/USPS-10 would not have included any references to NAA/R97-1 LR-2, since that document was not issued until October 1997, when the response to NAA/USPS-10 was due. Thirdly, nothing in NAA/USPS-10 requires the production or identification of NAA/R97-1 LR-2. Interrogatory NAA/USPS-10 is *not*, as NAA's Motion would have the Commission believe,[5] a request for production; rather, it consists of a series of focused questions on market share. No question asks for the production of any documents; only subpart 10(b) asks for the *identification* of a source for market share data in key lines of the Postal Service's business. NAA/R97-1 LR-2 is not a primary source document, but rather consists of a compilation of information from a variety of sources. As such, any one of the underlying sources of NAA/R97-1 LR-2 could have served as a source for market share data information. Thus, NAA is wrong to suggest that identification of NAA/R97-1 LR-2 was required in NAA/USPS-10. Finally, even assuming that NAA/R97-1 LR-2 was responsive and should have been identified as a source in the response to NAA/USPS-10(b), NAA makes no representation that it would have filed a request for production seeking its disclosure in a timely filed follow-up discovery request. Indeed, it is far from clear that it would have done so, since NAA freely admits that it was overwhelmed by the "rush of this docket's procedural schedule."

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[5] NAA Motion at 6 ("At the very least, the Postal Service should have forthrightly explained its intention to divert pre-printed advertising from newspapers to advertising mail and disclosed the USPS Marketing Document.").

NAA Motion at 6. In sum, the absence of a record of the filing of a response or objection to interrogatory NAA/USPS-10 bears absolutely no relationship to the pending motion, and does not serve as a basis in support of it.

It is also of no moment that NAA claims to have "discovered through other means the existence of the USPS Marketing Document" in February 1998, well after the time when discovery upon the Postal Service expired. In the course of any 10-month proceeding, participants may become aware of a host of interesting topics after the close of discovery on the Postal Service's case-in-chief. Yet this does not excuse participants from adhering to the time limits prescribed for discovery on the Postal Service's case-in-chief. If this sort of discovery were permitted to continue after the close of discovery on the Postal Service, "the discovery cutoff date would have little meaning." *See* P.O. Ruling No. R97-1/85 at 4.

Any effort to enter into the evidentiary record the proffered marketing plan, or even for the Commission to take official notice of it under Rule 31(j), would result in unfair prejudice that would substantially outweigh any probative value the document may have. The opportunity to "dispute the authenticity or accuracy" of documents proffered by a participant against the Postal Service is essential if the procedural due process interests of the Postal Service are to be adequately protected. *See* P.O. Ruling No. MC97-5/13 at 3. P.O. Ruling No. MC97-5/13 is instructive on this point, although it involved facts that differ slightly from those presented here. The underlying controversy resolved by that ruling concerned a participant's motion to admit several public documents into the evidentiary record after the close of

discovery on the Postal Service, and prior to the receipt of the Postal Service's rebuttal.[6] The Presiding Officer ruled that, because the proffered items were "public documents," their admission was appropriate under Rule 31(d)[7] and Rule 31(j).[8] Critical to that outcome, however, was the Presiding Officer's conclusion that the entry of the documents in the record could be made in a manner that would adequately protect the Postal Service's procedural due process interests. Specifically, the Presiding Officer concluded that the Postal Service "still [had] an opportunity to submit evidence in rebuttal . . ." at the time the ruling was issued.[9] The availability of rebuttal in that docket provided the Postal Service with "an opportunity to dispute the authenticity or accuracy of the documents . . ." that were the subject of the dispute in that docket. P.O. Ruling No. MC97-5/13 at 3. As a consequence, the Presiding Officer concluded that the Postal Service would not be

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[6] The documents included, *inter alia*, a *Postal Bulletin* article, an article from a newswire organization, and press releases downloaded from the Postal Service's web site.

[7] Rule 31(d) permits participants to offer into evidence "public documents," which can include reports, decisions, opinions, or published scientific or economic statistical data issued by executive branch agencies and legislative bodies. The offeror, however, has the burden of showing that the document is "reasonably available to the public . . . " NAA has made no such showing here; moreover, NAA/R97-1 LR-2 is not a "report, decision, opinion, or published scientific or economic statistical data." Assuming, for purposes of argument, the authenticity of NAA/R97-1 LR-2, such document would constitute sensitive commercial information that the Postal Service has traditionally protected and would not make widely available.

[8] Rule 31(j) enables the Commission to take official notice of matters "peculiarly within the general knowledge of the Commission as an expert body."

[9] The opportunity to submit rebuttal fulfilled the Rule 31(j) requirement permitting participants the opportunity to contest the Commission's taking notice of facts.

prejudiced by the late entry of the documents. P.O. Ruling No. MC97-5/13 at 3.

Here, by contrast, there is no opportunity for the Postal Service to submit testimony to explain the meaning of NAA/R97-1 LR-2. NAA filed its Motion *after* the opportunity to submit rebuttal has expired, and the procedural schedule contemplates no further opportunities to submit evidence to rebut the authenticity or accuracy of NAA/R97-1 LR-2, or to explain its purpose and contents in a manner that would give the Commission and the participants a meaningful and balanced understanding of the document.[10] There being no further opportunities for rebuttal, entry of NAA/R97-1 LR-2 into the evidentiary record at this late stage of the proceeding would be highly prejudicial to the Postal Service, by tainting the record with an unbalanced evidentiary presentation and posing a serious risk that participants and the Commission may misinterpret the contents of NAA/R97-1 LR-2.

Indeed, the controversy in Docket No. MC97-5 illustrates precisely why it is essential that documents not be entered against the Postal Service late in the proceeding after the opportunity to present testimony to explain their contents is no longer available. In Docket No. MC97-5, the participant seeking to include the documents in the evidentiary record drew false and erroneous conclusions from the public documents that it sought to have admitted. It was only through the submission of rebuttal testimony that the Postal Service was able to explain precisely how the

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[10] NAA/R97-1 LR-2 covers so many topics that the Postal Service could not prepare a meaningful explanation of its contents under the time frames of the compressed schedule of this proceeding, especially given the briefing responsibilities that persons litigating this case must bear.

conclusions that the offering party drew from the documents were plainly incorrect.[11]

Finally, it must be emphasized that entry of NAA/R97-1 LR-2 could frustrate the Postal Service's and Commission's common interest in securing the timely issuance of a recommended decision. The Presiding Officer has emphasized that this proceeding "must move forward with deliberate speed as we are operating on a compressed schedule. Therefore, discovery cutoff dates must be respected . . . ." P.O. Ruling No. R97-1/89 at 3. There are no exceptional circumstances here; consequently, it is imperative that discovery deadlines be observed.

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[11] In Docket No. MC97-5, the Coalition Against Unfair USPS Competition (CAUUC) sought to admit the packaging guidelines published by the Postal Service in the *Postal Bulletin* and the Postal Service's web site after its case-in-chief was filed, but before the Postal Service's rebuttal was due. CAUUC argued that the proffered documents were inconsistent with the Postal Service's operational plans for the proposed packaging service. *See* CAUUC Motion to Designate Additional Evidence (December 4, 1997). For example, CAUUC argued that, contrary to the guidelines published on the web site and in the *Postal Bulletin*, the Postal Service would not, in providing packaging service, include a mailing label inside the interior carton. *Id.* Postal Service rebuttal witness Thompson (USPS-RT-3) demonstrated that these claims were incorrect. *See* Docket No. MC97-5, Tr. 7/1783. Had the Postal Service not had the opportunity to submit testimony to explain and rebut the use CAUUC had already made, and would likely make, of the documents, the record may have been improperly characterized to the Postal Service's detriment. This experience highlights why it is essential that the Commission adhere to the procedural deadlines so as to prevent participants from tainting the record with one-sided and unbalanced evidentiary presentations. The Commission's proceedings work best when evidence is admitted--and properly rebutted--in an orderly fashion.

CONCLUSION

WHEREFORE, for the foregoing reasons, NAA's Motion must be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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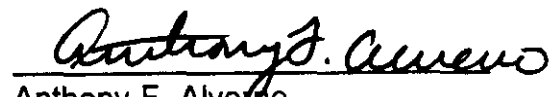
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



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